IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 186 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DHIRAJBHAI GORAKHBHAI NAYAK

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 186 of 1995

MR AVINASH K MANKAD for Petitioner No. 1

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant has preferred this appeal u/S. 374 (2) of the Code of Criminal Procedure (for short 'Cr.P.C.') challenging the judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge, Surat dated 31st January, 1995 in Sessions Case No. 242 of 1993. Vide said judgment the Ld. Judge has convicted the appellant for offence punishable u/S. 302 of the Indian Penal Code (for short 'IPC') and has sentenced him to suffer imprisonment for life and to pay a fine of Rs.2,000/-, in default further RI for one month. The Ld. Judge has also directed that fine, if paid, be given to Dahiben Hasmukhbhai by way of compensation.

2. The case of the prosecution is that Dahiben Hasmukhbhai Patel was staying at the relevant time in Dhastipura, Variyali Bazar locality in the city of Surat alongwith her sons Dharmesh and Narendra and her husband Hasmukhbhai. About 10 days prior to the date of the present incident, the appellant had taken his daughter Gitaben, aged about one and half years to the place of his parents-in-law and he had kept her there. After his return, the husband of Dahiben i.e. Hasmukhbhai scolded the appellant that why he had left such a small child at his parents-in-law at Ahmedabad. The appellant resented this and he started quarreling with Hasmukhbhai on this count. On 12/8/1993 at about 1.30 p.m. when Hasmukhbhai was sitting on the Ota of a temple situated in the locality where Dahiben resided, the appellant went to him and he challenged Hasmukhbhai that if he wanted to fight with him the appellant was ready for the same. This resulted initially into a hot exchange of words and thereafter a physical fight between the two. The residents of that locality and Dahiben intervened and separated them. Hasmukhbhai returned home with Dahiben. In the same evening at about 6.00 O'clock friend of Hasmukhbhai named Naranbhai came to the residence of Dahiben and told her that since the quarrel was going on in the house, he would take Hasmukhbhai with him to see a movie. Dahiben readily agreed to this and asked Naranbhai to take her husband alongwith him. Both Naranbhai and Hasmukhbhai therefore went to see a movie in the last show i.e. from 9.00 to 12.00. They returned at about 1.00 a.m. Dahiben immediately served food to them, which they ate and thereafter both Naranbhai as well as Hasmukhbhai went out of the house and slept on the Ota of the house. Dahiben and her son Dharmesh were sleeping inside the house. At about 4.00 O'clock in the morning Dahiben woke up on hearing her husband's shouts

and she immediately opened the door and went outside. Her son Dharmesh also woke up on hearing the shouts and he also went outside the house with his mother. When they went out they saw Hasmukhbhai in bleeding condition. They also saw the appellant delivering blows with dagger on the stomach of Hasmukhbhai. Dahiben therefore called out his name and asked him that why he was doing this and if there was any problem, that could be sorted out in the morning. The appellant on hearing this, immediately ran away from the place. Dahiben first went near her husband and thereafter she went to wake up persons from the neighbourhood. When she returned to her husband, she saw that Hasmukhbhai had received injuries on the neck, the upper portion of the hands, the chest and on the stomach. When Dahiben first came out of the house, Naranbhai also woke up at that time. Some persons from that locality removed her injured husband to Maskati hospital. Hasmukhbhai, however, died shortly thereafter i.e. at about 4.45 a.m. during the treatment in the hospital. Dahiben thereafter went to the Chowk Bazar Police Station at about 5.15 a.m. and lodged the first information report which was duly recorded by the Police Sub Inspector attached to the said police station.

2.1. On receipt of the FIR offence against the appellant was registered as I C.R.No. 225/1993 for offence punishable u/S. 302 of the IPC as well as section 135 of the Bombay Police Act. The investigation of the case was thereafter entrusted to P.S.I. Zafrullakhan Sattarkhan Pathan, who went to the Maskati Hospital and drew the inquest panchnama in the presence of two panchas. He thereafter sent the dead body of Hasmukhbhai for post mortem examination. During the course of investigation he drew the panchnama of scene of offence, collected blood stained earth, the blood, etc. and seized them under the panchnama. He also recorded statements of various persons, who were conversant with the facts of the incident. He also arrested the appellant, who produced before him the dagger used in commission of the offence. The clothes which were put on by the appellant at the time of incident, namely the Jersey and Lungi were also attached by the P.S.I. Necessary panchnamas were drawn for the same. He also arranged to get the map of the scene of offence to draw. On completion of the usual investigation, the P.S.I. submitted the charge-sheet in the Court of Ld. Judicial Magistrate First Class, 2nd Court, Surat, who in turn committed the case to the Court of Sessions as offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial the Ld. Addl. Sessions Judge, Surat framed charge at Exh.3 for offence u/S. 302 of the IPC and for offence u/S. 135 of the Bombay Police Act and the same was explained to the appellant. The appellant denied the charge and claimed to be tried.

4. At the trial, the prosecution in support of its case examined (1) Dahiben Hasmukhbhai Patel P.W.1 Exh.12, (2) Mangabhai Nagajibhai P.W.2 Exh.14, (3) Dharmeshkumar Hasmukhbhai P.W.3 Exh. 15, (4) Jamnaben Rangildas P.W.4 Exh.16, (5) Rajubhai Tarachand P.W.5 Exh.17, (6) Ripinbhai Nichhabhai P.W.6 Exh.18, (7) Dr. Rajivbhai Kantilal P.W.7 Exh.19, (8) Naranbhai Juribhai P.W. 8 Exh.22 (9) Dr. Sangitaben Ashokbhai P.W.9 Exh.24 and (10) Zafrullakhan S. Pathan P.W.10 Exh. 26. The prosecution also produced and relied on certain documentary evidence such as the panchnama and map of scene of offence, inquest panchnama at Exh.7, post mortem notes at Exh.8, complaint at Exh. 13, the reports of Forensic Science Laboratory and Serologist at Exhs. 10 and 9 respectively, the medical certificate and the death certificate of Hasmukhbhai at Exhs. 20 and 21 respectively, etc.

4.1. Upon completion of the recording of the oral evidence the appellant was given an opportunity to explain all the circumstances appearing against him in the evidence under the provisions of section 313 of the Cr.P.C. and the appellant except denying the circumstances did not come out with any specific case. He, however, submitted his written statement, which is on record at Exh.32, wherein he stated that he was innocent and that he had not committed any offence. According to him, there was no enmity between him and the deceased. According to him, the deceased Hasmukhbhai was in the habit of consuming liquor and he used to quarrel with any one in intoxicated condition. He further stated that the deceased used to invite his friends who were in the habit of consuming liquor and they used to have a drinking party at his place. According to the appellant, Naranbhai had developed illicit intimacy with the wife of Hasmukhbhai and for that reason there often used to be quarrel in the house. According to him, Naranbhai was of the native of Orissa and in the guise of Hasmukhbhai's friend he often visited Dahiben in the absence of Hasmukhbhai and had illicit relations with Dahiben. According to the appellant he had no personal knowledge about the incident, but he has stated that it was Dahiben and Naranbhai who in conspiracy with each other had committed the murder of Hasmukhbhai as Hasmukhbhai had become an object of obstruction in their illicit

relations. He has stated that since there was thick darkness at the place of incident, Dahiben taking disadvantage thereof, had falsely involved him in the crime and for that very reason Dahiben had not produced her blood stained sari before the police. She knew that if the sari was produced, her secret would be out. He has further stated that the dagger and the clothes i.e. Lungi and Jersey which were produced as Muddamal in the trial did not belong to him and they were not attached by the police from him and had nothing to do with the same. According to the appellant it was Dahiben who seemed to have produced all these articles before the police. He has also alleged in the statement that since no body from the locality was available to act as witness Dahiben had managed to get Naranbhai, whose mistress she was and her son Dahrmesh as witnesses. He has further alleged that one Jivan Kathiawadi also had illicit relations with Dahiben and he also came to the house of Dahiben often to attend the drinking parties. Lastly he has stated that he had nothing to do with the present murder case and that he was innocent and that he worked in the mill and stayed with his wife, children and children of his deceased brother.

5. That the Ld. Judge at the end of the trial came to the conclusion that the deceased Hasmukhbhai had died homicidal death and the prosecution had duly established that fact. He also came to the conclusion that the prosecution had established beyond any reasonable doubt that appellant had assaulted the deceased Hasmukhbhai near the house of Dahiben and had caused injuries to him on neck, stomach and other parts of the body by means of a dagger and thereby he had caused his death with the intention of causing his death or with the intention of causing injuries which were sufficient in ordinary course of nature to cause death of Hasmukhbhai. The Ld. Judge further came to the conclusion that the prosecution had not been able to prove that the appellant had committed breach of the notification issued by the Commissioner of Police, Surat u/S. 37(1) of the Bombay Police Act and, therefore, he had not committed any offence u/S. 135 of the Bombay Police Act. Thus, in the opinion of the Ld. Addl. Sessions Judge, Surat, the appellant was responsible for committing an offence u/S. 302 of the IPC and, therefore, has awarded sentence of imprisonment for life as already stated above.

6. At the hearing of this appeal Mr. Avinash K. Mankad, learned counsel for the appellant, has submitted before us that the judgment and order of conviction and sentence passed by the Ld. trial Judge are erroneous in

as much as the prosecution has not been able to prove its case beyond any reasonable doubt. According to him, the incident had taken place early in the morning at about 4.00 a.m. outside the house of the prosecution witness Dahiben and at that relevant point of time there would be darkness and that Dahiben and other so called eye witnesses could not have been in a position to identify the assailant. He has further submitted that the appellant has been falsely implicated in this case with a view to save the real culprit. According to Mr. Mankad, the real culprits were Dahiben and Naranbhai who had developed illicit intimacy and with a view to remove the obstruction in the form of Hasmukhbhai, he was done to death by these two persons. He has further submitted that merely because some quarrel had taken place between the appellant and the deceased some time prior to the present incident, he has been made the scape goat by Dahiben and Naranbhai. Mr. Mankad has further submitted that the motive attributed to the appellant for committing the crime is not probable because the deceased had no reason to quarrel with the appellant only because the appellant had left his child Gita with his own parents-in-law at Ahmedabad. He has lastly submitted that even if the case of prosecution is taken to be true, the offence which is alleged to have been committed by the appellant would not be an offence u/S. 302 of the IPC, but it would be covered under one of the exceptions to Section 300 of the IPC, which could be made punishable u/S. 304 Part-I of the IPC. As against that, Mr. H.H. Patel, Ld. APP for the State has submitted that the prosecution by leading cogent and reliable evidence has successfully established the guilt of the appellant and the conviction recorded and sentence imposed by the trial Court are just, proper and legal and the present appeal therefore deserves to be dismissed.

7. The Ld. counsels in support of their rival contentions have taken us through the entire record of the case. We have also appreciated the oral as well as documentary evidence on record afresh with a view to deal with the rival contentions.

8. We may now turn our attention to the question whether the prosecution has been able to establish the guilt of the appellant beyond reasonable doubt.

9. We may first deal with the issue whether the trial Court is right in holding that the deceased had died a homicidal death.

9.1. To establish this fact the prosecution has

examined Dr. Rajivbhai Kantilal Mehta P.W.7 Exh.19 and Dr. Sangitaben Ashokbhai Mehta P.W.9 Exh.24. The prosecution has also produced certain documentary evidence such as medical certificate regarding injuries sustained by the deceased, the post mortem notes and the inquest panchnama.

9.2. Dr. Rajivbhai Kantilal Mehta has deposed that on 13th August, 1993 at about 11.00 a.m. he was working as Tutor in Forensic Medicine in New Civil Hospital, at that time police constable Champakbhai of Chowk Bazar Police Station had brought dead body of male alongwith the inquest panchnama for carrying out its post mortem examination. At about 11.15 a.m. he alongwith Dr. Eliash Shaikh commenced the post mortem examination and completed it at about 12.30 p.m. During the post mortem examination they had noticed the following external injuries on the dead body :-

(1) Through and through stab wound on the anterior aspect of the neck in the middle, transverse, 3 x .5 cm in size. Exit wound present on the back of the neck right to the midline 2 x .5 cm. in size.
(2) 8 x 1.4 cm. incised wound on the anterior aspect of the neck 2 cm. below the injury No.1 deep on left side and tailing present on right side margins and angles clean cut transverse.
(3) 2.7 x 1.8 cm. stab wound in the 7th intercostal space. 8 cm. below the left nipple. 10 cm. above the left heal on left side. Beveling present, oblique directing below upwards and laterally upper angle relatively blunt.
(4) 1 x 1.3 cm. incised would on left side of the chest at lateral aspect, 6 cm. away from the left nipple margins and one angles acuter (one angle relatively blunt).
(5) 2 x .5 cm. stab wound in umbilical region on right side. 2 cm. away from the umbilicus over the abdomen vertical.
(6) 1.5 x .5 cm. incised wound on the vase of the 3rd finger on left side.
(7) 3 x 1 cm. incised would in the middle of posterior aspect of left upper arm.
(8) Incised wound on the left scapular region. 2 x 1 cm. in size.
(9) A chop wound of 8 x 2.5 cm. over the posterior aspect of right forearm in the middle underlying muscles and ulna-bone cut.
(10) 1 x .5 cm. abrasion on the left leg anterior aspect. 10 cm. below the knee fresh.

(11) Venesection mark on Rt. feet.

He had also noticed following internal injuries :-

(1) Thoracis cavity contain 50 ml. of blood
(2) 7th rib partially corresponding to external injury No.3,
(3) Muscles of praetorium as well as abdominal cavity are cut corresponding to external injury No.5
(4) Internal jugular vain cut corresponding to left external injury No.1 muscles also cut.

These injuries corresponded to injuries Nos. 3, 5 and 1 respectively. According to him, death was as a result of injury to right internal jugular vain and multiple injuries received over the body by sharp cutting weapon. According to this witness, the injury no. 1 was sufficient in ordinary course of nature to cause death. He has also opined that the other injuries together with injury No.1 were also sufficient in ordinary course of nature to cause death. In the cross-examination by the defence, this witness has admitted that the process of rigger mortis was already over. He has further stated that such process could be over within 12 hours in hot season and it may take about 24 hours in the days of monsoon. He has denied the suggestion of the defence that the injuries were not caused by sharp cutting instrument. We may say that though this witness has been extensively cross-examined, nothing much of any importance from the defence point of view has been elicited from this witness.

9.3. The second witness on this point is Dr. Sangitaben Ashokbhai Mehta, who has deposed that on 13th August, 1993 she was attached to Maskati Hospital as Medical Officer. She had a night duty on that day. At about 4.35 a.m. Hasmukhbhai Ratilal was brought to the hospital for treatment and he was admitted as indoor patient. During treatment she had noticed about six injuries on the body of Hasmukhbhai, which were duly recorded in the case papers. She has further stated that at about 4.50 a.m. Hasmukhbhai died during the treatment. She has produced before the Court the original case papers at Exh. 25. On the strength of these case papers she had also prepared the medical certificate which has been produced on record at Exh. 20. She has stated that as the patient had died during treatment, she had made arrangement to send the dead body for post mortem examination. In the cross-examination by the defence this witness has stated that as she was not told with which weapon the injuries were caused, she had

not stated in the case papers the nature of weapon used by the assailant. She has also stated in the cross-examination that looking to the injuries on the body, she would not be able to state that in what position the victim would be when these injuries were caused. She has also stated that the injuries to the victim would have been caused with any pointed sharp cutting instrument.

9.4. Over and above this, there is inquest panchnama which shows that the body of Hasmukhbhai had sustained number of injuries.

9.5. The aforesaid medical evidence clearly shows that Hasmukhbhai had received multiple injuries and as a result of these injuries he had died within short time of attack on him. We, therefore, hold that the prosecution has successfully established the fact that deceased Hasmukhbhai had died a homicidal death and the finding arrived at by the trial Court on that count is proper.

10. The next question that is to be considered by us is whether the prosecution has been able to prove that the appellant was the author of this crime.

10.1 To establish this fact, the prosecution has examined Dahiben, wife of Hasmukhbhai P.W.1 Exh.12. In her examination-in-chief she has stated that she was staying with her sons Dharmesh and Narendra and her husband Hasmukhbhai. She has further stated that about 10 days prior to the present incident the appellant had gone to Ahmedabad to his parents-in-law and he had left his daughter aged about one and half year with them. When deceased Hasmukhbhai came to know about this, he told the appellant that it was not proper on his part to leave the child with his parents in law. The appellant did not like this and he quarrelled with Hasmukhbhai. She has further stated that on 12th August, 1993 at about 1.30 p.m. while Hasmukhbhai was sitting on the Ota of the temple situated in their locality, appellant accosted him and told him that if Hasmukhbhai wanted to fight with him, the appellant was ready for that. This initially resulted into hot exchange of words between them and thereafter it turned into a scuffle. They were separated by this witness and other residents of the locality. She has further stated that in the evening at about 6.00 p.m. friend of her husband Naranbhai came to their place and he told the witness that he would take Hasmukhbhai with him to see a movie as there was quarrel going on in the house and she readily agreed to this. According to her,

Naranbhai and her husband went for the movie in the last show i.e. from 9.00 p.m. to 12.00 p.m. and they returned at about 1.00 a.m. in the night. She served meals to them and after having the same Hasmukhbhai and Naranbhai went outside the house and slept on the Ota of the house, whereas she and her son Dharmesh slept inside the house. At about 4.00 a.m. early in the morning she woke up as she heard the shouts of her husband. Her son Dharmesh also woke up on account of this. She opened the door and went outside followed by her son Dharmesh and she saw the appellant giving dagger blows to her husband. She, therefore, called the appellant by his name and asked him not to do that and further told him that if there was any problem it could be sorted out in the morning. On hearing this, the appellant ran away. According to this witness, the incident was also seen by Dharmesh. This witness has further stated that after the appellant had run away, she had gone to call the persons from the neighbourhood and when she came back, she saw that her husband had received injuries on the neck, upper portion of the hands, chest and the stomach. She has further stated that her neighbours Mangabhai Nagajibhai and Jamnaben Rangildas had already arrived there. Naranbhai had also woken up during this time. She has further stated that her husband was removed to the hospital for treatment, but within short time he expired. According to her, at the time of assault the appellant had put on a Jersey and the Lungi.

10.2. In the cross-examination, this witness has admitted that Hasmukhbhai was her second husband. She has, however, denied that Naranbhai Juribhai was her paramour. She has also denied the suggestion of the defence that she was also having illicit relations with one Jivan Kathiawadi. She has reiterated in the cross-examination that she and Dharmesh had seen the appellant causing injuries to Hasmukhbhai, but Mangabhai Nagajibhai and Jamnaben had not seen him doing so but they had only seen him running away. She has further stated in the cross-examination that there is a tubelight lamp post and is situated just opposite to their lane at a distance of about 15 to 20 ft. and the light of this tubelight was coming in their lane. She has denied the suggestion by the defence that their house was situated on the back side of the aforesaid lamp post. She has also denied the suggestion that she had developed love affair with Hasmukhbhai when he was working as carrier of illicit liquor. She has also denied the suggestion that Naranbhai permanently stayed with them. Though she has admitted that Hasmukhbhai and Naranbhai were having liquor together, she has stated that that was only

occasionally i.e. on the occasion of some festival, etc. Further though she has admitted that Naranbhai used to visit their house on every 7th and 22nd of the month, she has denied the suggestion that he was visiting her on these days with a view to please her. She has also denied the suggestion that she and Naranbhai after entering into a conspiracy had committed the murder of Hasmukhbhai and had filed false complaint against the appellant. Further she has admitted that her husband was consuming liquor daily, but she has denied that whenever he consumed liquor, he quarrelled with the residents of the locality.

10.3. This witness has given complaint at about 5.15 a.m. to the Chowk Bazar Police Station and the same has been brought on record at Exh.13.

10.4. The second witness examine on this count is Mangabhai Nagajibhai, who has stated that deceased Hasmukhbhai and his wife and children lived just adjoining to the house of Dahiben. He has stated that on account of the hue and cry he had gone to see as to what had happened and when he reached the spot, he had seen various persons gathered over there. He has, however, not supported the prosecution and with the permission of the Court, he has been declared hostile and he is confronted with his previous statement made before the police by the Ld. Public Prosecutor appearing in the trial Court. He has also been cross-examined by the defence, but nothing of any importance has been brought out by the defence.

10.5. The third witness is Dharmeshkumar Hasmukhbhai. This witness is the son of Dahiben and Hasmukhbhai. He has stated that on the night of incident his father and Naranbhai were sleeping on the Ota of the house while he and his mother were sleeping inside the house. He has further stated that in the morning at about 4.00 a.m. shouts of his father were heard and, therefore, his mother opened the door and they had gone out to find out as to what was happening. When the door was opened, this witness had seen the appellant giving dagger blows to the deceased on the various parts of the body.

10.6. In the cross-examination by the defence, he has denied that Naranbhai was daily visiting their place. He has further stated in the cross-examination that he would not be able to say the length of the dagger as he had no occasion to measure its size. He has also supported the version of his mother that light of the tubelight situated outside their lane could reach upto the area in

front of their house. According to him, the lamp post was situated at a distance of 15 ft. from the Ota of their house and there was no obstruction in between. Lastly he has denied the suggestion of the defence that he was giving false evidence at the instance of his mother.

10.7. Jamnaben Rangildas has stated in her evidence that she was staying in the neighbourhood and she was very friendly with Dahiben. She has also stated that on account of the child of the appellant there was a quarrel between the appellant and the deceased on a day prior to incident. In the cross-examination of this witness the defence has not been able to elicit any material which could render the version of the prosecution doubtful.

10.8. The prosecution has also examined Naranbhai, who has stated that since Hasmukhbhai was working in the same factory he was known to him. He has further stated that on the day previous to the date of incident at about 6.00 O'clock in the evening he reached to the house of Hasmukhbhai and had taken him to see a movie in the last show. They returned at about 1.00 O'clock and after having a cup of tea he went outside the house with Hasmukhbhai to sleep on the Ota. He has further stated that in the morning at about 4.00 O'clock he woke up on hearing the shout of Dahiben and at that time he had seen the appellant giving dagger blows to Hasmukhbhai on his stomach. He has further stated that he alongwith several other persons had removed the injured to the hospital, where he had died within 15 to 20 minutes of reaching the hospital. In the cross-examination by the defence he had stated that one person had met him in Dhastipura locality and had informed him that he was supposed to give evidence before the Court today. He has further stated that he had come to know that the recording of the evidence of Dahiben and Dharmesh was already over. According to this witness, on the day prior to the date of incident he had been to the house of Hasmukhbhai and he had asked him to come to see a movie with him in the night show. Accordingly Hasmukhbhai had gone with him. When they returned home it was late in the night and, therefore, Hasmukhbhai had told him to sleep at their place and, therefore, instead of going home he had slept with Hasmukhbhai on the Ota. He has denied the suggestion by the defence that Dahiben was his mistress and he used to visit her on every 7th and 22nd of the month to please her. He has further denied the suggestion that in the absence of Hasmukhbhai he used to go to Dahiben. Though he has admitted that his wife and children were living in Orissa, he has denied the

suggestion that Dahiben was providing him with all the facilities which a wife could provide to her husband. He has further stated that when he woke up, he had seen Dahiben standing near the injured Hasmukhbhai and at that time the assault was already over. He has denied the suggestion that he and Dahiben together had committed the murder of Hasmukhbhai.

10.9. The evidence of aforesaid witnesses clearly shows that incident had taken place early in the morning at about 4.00 O'clock on 13th August, 1993 in which husband of Dahiben had received serious injuries. The evidence of Dahiben and Dharmesh further shows that they had actually seen the appellant giving dagger blows to the deceased. In fact Dahiben had called the appellant by his name and she had requested him not to do so and told him that if there was any problem it could be sorted out in the morning. When this is the position of the evidence no doubt can be raised with regard to the identity of the assailant. The evidence of aforesaid witnesses, especially that of Dahiben, Dharmesh and Naranbhai, clearly establishes that there is a lamp post situated just opposite to the house at the distance of about 15 to 20 ft. and the tubelight was fixed on that lamp post. At the time of incident the tubelight was on and its light reached upto the area in which the incident took place. Over and above this, the assailant i.e. the present appellant was closely known to the witnesses Dahiben and Dharmesh. In these circumstances, there is hardly any scope for mistaken identity. So far evidence of Naranbhai is concerned, though in the examination-in-chief he claims that he had seen the appellant giving dagger blows to the deceased, in the cross-examination he has slightly diverted from his version and, therefore, much reliance cannot be placed for the purpose of identity of the appellant on the evidence of this witness.

11. Apart from evidence of the eye witnesses, there is other evidence also on record to corroborate the version of witnesses Dahiben and Dharmesh. During the course of investigation the Investigating Officer had arrested the appellant and had attached the clothes put on by him at the time of incident. The Investigating Officer had attached dagger, a Jersey and a Lungi which were stained with blood. It may be recalled that Dahiben has also stated in her evidence that at the time of incident the appellant had put on Jersey and Lungi, which had been attached by the police. It is, therefore, not a matter of doubt that the witnesses could have identified the assailant in the light of tubelight situated opposite

to their house.

11.1. Moreover, that the incident had taken place at around 4.15 a.m. and the F.I.R. came to be lodged with the police at 5.15 a.m. i.e. within one hour of the incident and in the F.I.R. the entire incident has been described in detail by informant Dahiben. All these circumstances lead to only one conclusion that it was the appellant who had assaulted deceased Hasmukhbhai in early hours of morning of 13th August, 1993 and had caused him fatal injuries by means of deadly weapon like dagger. Therefore, we have no hesitation in holding that the prosecution had established beyond any reasonable doubt that it was the appellant who had committed this crime.

11.2. At this juncture we may also test the defence version and the contention raised by Mr. Mankad to the effect that witness Dahiben was of loose character and at the time of incident she was living as a mistress of Naranbhai and with a view to remove Hasmukhbhai from their way, Dahiben and Naranbhai had conspired to kill him. The other limb of this contention is that on the night between 12th and 13th August, 1993 Naranbhai had slept at the place of Hasmukhbhai and when every one was asleep he and Dahiben had tried to have illicit relations, but as Hasmukhbhai woke up, he resented this and therefore, they had done him to death. We are not at all impressed by this contention. It is a matter of regret that without there being any evidence on record such wild and baseless allegations have been levelled against a lady. The defence has put suggestions to this effect to various witnesses, but they have flatly denied the same. It is a matter of common knowledge that mere suggestion put to witnesses can never take the shape of evidence and more so when they are totally denied by the witnesses. The evidence of Investigating Officer Mr. Pathan shows that in his cross-examination the defence has asked him whether he came across any evidence during his investigation showing any illicit relationship between Naranbhai and Dahiben and in answer to this question the Investigating Officer has clearly stated that he had not come across any such evidence. We are, therefore, not inclined to accept the contention of Mr. Mankad on this count.

11.3. Apart from the absence of any evidence on record from the point of view of probability, even this contention does not stand to reason in as much as when the son of Dahiben aged about 15 years is sleeping with her and when her husband is sleeping just on the Ota outside the house, Naranbhai would venture to go inside

the house and have sexual intercourse with Dahiben. The conduct suggested by the defence on the part of these two persons, namely Naranbhai and Dahiben is totally against normal human behaviour and such contention therefore cannot be accepted.

12. Mr. Mankad has faintly tried to suggest that looking to the entire background of this incident it can be said that the appellant under the grave and sudden provocation might have committed this crime or it might have resulted from a sudden quarrel between the two and, therefore, the present incident could be covered under exceptions to Section 300 of the IPC. We fail to understand that why such argument can be advanced when there is not an iota of evidence to that effect on the record. So far the quarrel between the appellant and the deceased is concerned, it has taken place around 1.30 p.m. on 12th August, 1993; whereas the present incident had taken place in the early morning at about 4.15 on 13th August, 1993. Therefore, there was no scope for any grave or sudden provocation or the present incident could not be termed as a result of sudden quarrel or fight between the two. It cannot therefore fall in the category of offence punishable u/S. 304 Part-I of the IPC.

13. Considering the totality of the facts and circumstances of this case, we have no hesitation to hold that the prosecution has amply proved that the appellant had committed an offence punishable u/S. 302 of the IPC. This appeal, therefore, does not have any merit and it deserves to be dismissed and it is hereby ordered to be dismissed. Muddamal to be disposed of in terms of the directions given by the Ld. trial Judge in the impugned judgment.

[K.R. VYAS, J.]

[AKSHAY H. MEHTA,J.]

* Pansala.